92-1431

Supreme Court, U.S.
FILED
FEB 26 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

EDWARD MATHEWS, BEARL MATHEWS,
NEHEMIA MATHEWS, NATHAN MATHEWS AND
JAMES MATHEWS

Petitioners

VS.

HARRIS METHODIST, FORT WORTH, A
NON-PROFIT CORPORATION;
TARRANT-PARKER COUNTY MEDICAL EXAMINERS
DISTRICT; AND LIONS ORGAN AND EYE BANK,
DISTRICT 2E2, INC., A TEXAS
CORPORATION

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

LAURANCE L. PRIDDY
PRIDDY & CHOVANEC
301 Commerce Street
Suite 1210
Fort Worth, Texas 76102
817-877-1671
ATTORNEYS FOR
RESPONDENTS

Februrary 24, 1993

QUESTIONS PRESENTED

1. Does this court's decision in Peralta v. Heights Medical Center, Inc., 485 U.S. 80 (1988), holding that default judgments taken without notice violate the due process clause of the 14th Amendment to the United States Constitution, apply with equal force to invalidate as unconstitutionally impermissible dismissals of causes of action without notice to the parties at a time when the running of the statute of limitations prevents refiling?

2. Did dismissal of the Petitioners' cause of action without notice to them at a time when the statue of limitations had run so as to prevent refiling deprive the Petitioners of due process of law as guaranteed by the 14th Amendment to the United States Constitution?

3. Do the procedures provided by

Rules 165a and 306a of the Texas Rules of Civil Procedure violate due process of law as guaranteed by the 14th Amendment to the United States Constitution by permitting dismissal of causes of action without notice to the parties after the statute of limitations has run so as to prevent refiling?

LIST OF PARTIES

Petitioners

Edward Mathews;
Bearl Mathews;
Nehemia Mathews;
Nathan Mathews; and
James Mathews

Respondents

Harris Methodist, Fort Worth, A Non
-Profit Corporation;
Tarrant-Parker County Medical Examiners
District; and
Lions Organ and Eye Bank, District
2E2, Inc., A Texas Corporation

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REASONS FOR GRANTING THE WRIT:

I. The refusal of the Texas Court of Appeals and the Texas Supreme Court to reinstate Petitioners' cause of action after its dismissal without notice to Petitioners at a time when the applicable statute of limitations prevented refiling deprived the Petitioners of due process of law under the 14th Amendment to the United States Constitution, and is in conflict with this court's opinion in Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 99 L.Ed.2d 75 108 S.Ct., 896 (1988). 17

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II. The procedure established for notification of dismissal for lack of prosecution under Rule 165a, Texas Rules of Civil Procedure and Rule 306a, Texas Rules of Civil Procedure, providing that time periods for appeal run on dismissals even where there has been no notice of the dismissal, are violative of due process of law as guaranteed by the 14th Amendment to the United States Constitution. 17-18

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NO._____

EDWARD MATHEWS, BEARL MATHEWS,
NEHEMIA MATHEWS, NATHAN MATHEWS AND
JAMES MATHEWS
Petitioners

VS.

HARRIS METHODIST, FORT WORTH, A
NON-PROFIT CORPORATION;
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DISTRICT; AND LIONS ORGAN AND EYE BANK,
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Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF TEXAS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners herein pray that a Writ of Certiorari issue to the Supreme Court of the State of Texas to review that court's

order of December 2, 1992, overruling Petitioners' Motion for Rehearing, and also to review the Texas Supreme Court's earlier denial of writ, and the opinion of the Court of Appeals for the Second Court of Appeals for the Second Court of Appeals District of Texas of July 22, 1992.

OPINIONS BELOW

The order of the Texas Supreme Court overruling Petitioners' Motion for Rehearing in this cause is reproduced in the Appendix at page A-1. The order of the Texas Supreme Court denying Petitioners' Application for Writ of Error is reproduced at page A-2 of the Appendix. These orders are not reported.

The judgment and opinion of the Texas Court of Appeals for the Second Court of Appeals District of Texas are reproduced at pages A-3 and A-4 of the Appendix. It is reported as Mathews v. Harris Methodist, Fort Worth, 834 S.W.2d 582 (Tex.App.-Fort Worth, 1992, writ denied).

JURISDICTION

The Court of Appeals for the Second Court of Appeals District of Texas issued its judgment and opinion on July 22,

1992.[1] The Texas Supreme Court declined to review the Court of Appeals' opinion through the granting of writ of error by an unpublished order dated November 4, 1992.[2] The Texas Supreme Court overruled Petitioners' Motion for Rehearing by unpublished order dated December 2, 1992.[3] Jurisdiction is conferred on this court by 28 U.S.C. Section 1254(1), since this petition is being filed within ninety (90) days of the final order of the Texas Supreme Court, as provided by Sup. Ct. R. 13.4.

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[1] Appendix, pages A-3 and A-4

[2] Appendix, page A-2

[3] Appendix, page A-1

STATUTES AND RULES INVOLVED

Rule 165a of the Texas Rules of Civil Procedure provides as follows:

> 1. **Failure to Appear.** A case may be dismissed for want of prosecution on failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice. Notice of the court's intention to dismiss and the date and place of the dismissal hearing shall be sent by the clerk to each attorney of record, and to each party not represented by an attorney and whose address is shown on the docket or in the papers on file, by posting same in the United States Postal Service. At the dismissal hearing, the court shall dismiss for want of prosecution unless there is good cause for the case to be maintained on the docket. If the court determines to maintain the case on the docket, it shall render a pretrial order assigning a trial date for the case and setting deadlines for the joining of new parties, all discovery, filing of all pleadings, the making of a response or supplemental responses to discovery and other pretrial matters. The case may be continued

thereafter only for valid and compelling reasons specifically determined by court order. Notice of the signing of the order of dismissal shall be given as provided in Rule 306a. Failure to mail notices as required by this rule shall not affect any of the periods mentioned in Rule 306a except as provided in that rule.

2. **Non-Compliance With Time Standards.** Any case not disposed of within time standards promulgated by the Supreme Court under its Administrative Rules may be placed on a dismissal docket.

3. **Reinstatement.** A motion to reinstate shall set forth the grounds therefor and be verified by the movant or his attorney. It shall be filed with the clerk within 30 days after the order of dismissal is signed or within the period provided by Rule 306a. A copy of the motion to reinstate shall be served on each attorney of record and each party not represented by an attorney whose address is shown on the docket or in the papers on file. The clerk shall deliver a copy of the motion to the judge, who shall set a hearing on the motion as soon as practicable. The court shall notify all parties or

their attorneys of record of the date, time and place of the hearing.

The court shall reinstate the case upon finding after a hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained.

In the event for any reason a motion for reinstatement is not decided by signed written order within seventy-five days after the judgment is signed, or, within such other time as may be allowed by Rule 306a, the motion shall be deemed overruled by operation of law. If a motion to reinstate is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to reinstate the case until 30 days after all such timely filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

4. **Cumulative Remedies.** This dismissal and reinstatement procedure shall be cumulative of the rules and laws governing any other procedures available to the parties in such cases. The same reinstatement

> procedures and timetable are applicable to all dismissals for want of prosecution including cases which are dismissed pursuant to the court's inherent power, whether or not a motion to dismiss has been filed.

Rule 306a of the Texas Rules of Civil Procedure provides as follows:

> 1. **Beginning of Periods.** The date of judgment or order is signed as shown of record shall determine the beginning of periods prescribed by these rules for the court's plenary power to grant a new trial or to vacate, modify, correct or reform a judgment or order and for filing in the trial court the various documents that these rules authorize a party to file within such periods including, but not limited to, motions for new trial, motions to modify judgments, motions to reinstate a case dismissed for want of prosecution, motions to vacate judgment and requests for findings of fact and conclusions of law; but this rule shall not determine what constitutes rendition of a judgment or order for any other purpose.
>
> 2. **Date to be Shown.** Judges, attorneys and clerks are

directed to use their best efforts to cause all judgments, decisions and orders of any kind to be reduced to writing and signed by the trial judge with the date of signing stated therein. If the date of signing is not recited in the judgment or order it may be shown in the record by a certificate of the judge or otherwise; provided, however, that the absence of a showing of the date in the record shall not invalidate any judgment or order.

3. **Notice of Judgment.** When the final judgment or other appealable order is signed, the clerk of the court shall immediately give notice to the parties or their attorneys of record by first-class mail advising that the judgment or order was signed. Failure to comply with the provisions of this rule shall not affect the periods mentioned in paragraph (1) of this rule, except as provided in paragraph (4).

4. **No Notice of Judgment.** If within twenty days after the judgment or other appealable order is signed, a party adversely affected by it or his attorney has neither received the notice required by paragraph (3) of this rule nor acquired actual knowledge of

the order, then with respect to that party all the periods mentioned in paragraph (1) shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the signing, whichever occurred first, but in no event shall such periods begin more than ninety days after the original judgment or other appealable order was signed.

5. **Motion, Notice and Hearing.** In order to establish the application of paragraph (4) of this rule, the party adversely affected is required to prove in the trial court, on sworn motion and notice, the date on which the party or his attorney first either received a notice of the judgment or acquired actual knowledge of the signing and that this date was more than twenty days after the judgment was signed.

6. **Nunc Pro Tunc Order.** When a corrected judgment has been signed after expiration of the court's plenary power pursuant to Rule 316, the periods mentioned in paragraph (1) of this rule shall run from the date of signing the corrected judgment with respect to any complaint that would not be applicable to the original document.

> 7. **When Process Served by Publication.** With respect to a motion for new trial filed more than thirty days after the judgment was signed pursuant to Rule 329 when process has been served by publication, the periods provided by paragraph (1) shall be computed as if the judgment were signed on the date of filing the motion.

Rule 329b of the Texas Rules of Civil Procedure provides in pertinent part as follows:

> (f) On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rule 316, and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired.

Section 16.003, Vernon's Texas Civil Practices and Remedies Code, provides as follows:

(a) A person must bring suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues.

(b) A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person.

STATEMENT OF THE CASE

On December 6, 1987, the Petitioners' brother, Phillip Andrew Mathews, was seriously injured in a car wreck and subsequently died in Harris Hospital, Fort Worth. Without the consent of the Petitioners as next of kin, employees or agents of one, some or all of the Respondents removed the corneas from the decedent's eyes.[4]

Petitioners sued the Respondents on several theories of liability in Cause No. 153-122176-89, filed August 7, 1989, in the 153rd District Court of Tarrant County, Texas. On September 28, 1990, the District Court dismissed the cause for lack of prosecution without actual notice to Petitioners or their attorney.

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[4] These facts are alleged in Plaintiffs' Original Petition which is part of the original record in the Texas courts.

In March of 1991, the Petitioners learned for the first time that their case had been dismissed. They filed an equitable bill of review on March 28, 1991, seeking reinstatement on the basis that they had no notice of the dismissal. Edmund Brown, the Petitioners' attorney at the time of dismissal, testified at the bill of review hearing that he had no notice of the dismissal.

No evidence was introduced showing that the Petitioners or their attorney had any notice of the dismissal until March of 1991, other than the fact that the cause had been posted on a dismissal docket. Dismissal under these circumstances was tantamount to final disposition of the case, since the two year Texas statute of limitations had run by the time Petitioners learned of the

dismissal.[5] The event made the basis of the litigation occurred on December 6, 1987.

The trial court denied Petitioners' bill of review by order dated September 13, 1991. Petitioners perfected appeal to the Court of Appeals for the Second Court of Appeals District of Texas, which affirmed the trial court's denial of the bill of review by opinion and order dated July 22, 1992, in Mathews v. Harris Methodist Fort Worth, 834 S.W.2d 582 (Tex.App.-Fort Worth, 1992, writ denied).[6]

The Petitioners raised the constitutionality of the dismissal of their case under the due process clause

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[5] See Section 16.003, Vernon's Texas Civil Practices and Remedies Code, pages 11 and 12.

[6] Appendix, page A-4

of the Fourteenth Amendment to the United States Constitution both as grounds for relief in their bill of review in the trial court, and as a point of error in the Texas Court of Appeals for the Second Court of Appeals District of Texas. The Court of Appeals addressed this point in its opinion.[7]

The Petitioners petitioned the Texas Supreme Court for writ of error. The Texas Supreme Court denied the application by unpublished order dated November 4, 1992,[8] and overruled Petitioners' motion for rehearing by unpublished order December 2, 1992.[9] The order of the Texas Supreme Court overruling Petitioners' Motion for

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[7] Mathews v. Harris Methodist, Appendix, pages A-11 and A-12

[8] Appendix, page A-2

[9] Appendix, page A-1

Rehearing represents the final appellate step available to Petitioners through the Texas courts. This petition for writ of certiorari is presented within ninety days of the final action of the Texas Supreme Court.

REASONS FOR GRANTING THE WRIT

I. The refusal of the Texas Court of Appeals and the Texas Supreme Court to reinstate Petitioners' cause of action after its dismissal without notice to Petitioners at a time when the applicable statute of limitations prevented refiling deprived the Petitioners of due process of law under the 14th Amendment to the United States Constitution, and is in conflict with this court's opinion in Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 99 L.Ed.2d 75, 108 S.Ct., 896 (1988).

II. The procedure established for notification of dismissal for lack of prosecution under Rule 165a, Texas Rules of Civil Procedure and Rule 306a, Texas Rules of Civil Procedure, providing that time periods for

> appeal run on dismissals even where there has been no notice of the dismissal, are violative of due process of law as guaranteed by the 14th Amendment to the United States Constitution.

Rule 165a of the Texas Rules of Civil Procedure establishes the procedure for dismissal for want of prosecution in Texas.[10] It provides that notice of dismissal is to be sent to the attorneys, but fails to provide any procedure for verification that notice has been received. It further provides that failure to mail the notice does not affect the time periods set out in Rule 306a, Texas Rules of Civil Procedure.[11] Rule 306a provides that all applicable time periods begin to run when the judgment is signed.

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[10] Page 5

[11] Page 9

Rule 165a and Rule 306a provide motions to reinstate causes dismissed for want of prosecution may be filed until thirty days after the order of dismissal is signed.[12] Under Rule 306a, the running of the thirty day period is tolled for ninety days where the party has had no notice of dismissal.[13] In other words, in such cases, the judgment is final 120 days after it is signed, even if the parties have had no notice of the dismissal, and thereafter, review may only be had by bill of review.[14]

This cause of action was dismissed for want of prosecution without actual notice to the Petitioners or their attorney on

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[12] Rule 165a(3), Page 6

[13] Rule 306a(4), Page 9

[14] Rule 329b(f), Appendix, page 11

September 13, 1991.[15] The Petitioners did not learn of the dismissal until March, 1991, and therefore could not reinstate under Rules 165a and 306a, since the trial court's plenary power under those rules to reinstate had expired in January, 1991, 120 days after the dismissal was signed.

Accordingly, the Petitioners filed their bill of review pursuant to Rule 329b(f) on March 28, 1991. It was denied by the trial court and the denial was upheld by the Court of Appeals for the Second Court of Appeals District of Texas and by the Texas Supreme Court, as previously noted.

The evidence in this case clearly demonstrates that neither the Petitioners nor their attorney, Brown, had actual

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[15] Court of Appeals opinion, Mathews v. Harris Methodist, Appendix, page A-4

notice of the dismissal of their cause of action until after the plenary jurisdiction of the trial court to reinstate the cause had expired. None of the court documentation documenting the dismissal of the cause of action shows that actual notice was ever accomplished or even attempted. No evidence was elicited showing that any notice was ever even mailed to Petitioners counsel. Whether or not a notice was mailed, Petitioners' counsel, Edmund Brown, clearly and unequivocally testified that he did not receive the notice, even though when he moved his office to another location in Fort Worth, he continued to receive mail through a forwarding order with the post office.

Under these circumstances, since the statute of limitations has run on their claim, and had run on the claim by the

time they learned it had been dismissed, the Petitioners have forever lost any right to redress against the Respondents for the wrongful removal of the corneas from the eyes of their deceased brother, without having had actual notice that dismissal had occurred within time for reinstatement of the cause under the court's plenary jurisdiction. The record further does not demonstrate that notification to Petitioners of dismissal of this case was even attempted.

This court found fault with Texas' default procedure in permitting a default without actual notice to stand in Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 99 L.Ed.2d 75, 108 S.Ct. 896 (1988).

This court held in part as follows:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonable calculated, under

> the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections" Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 94 L.Ed. 865, 70 S.Ct. 652 (1950).
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> "Failure to give notice violates the most rudimentary demands of due process of law." Armstrong v. Manzo, 380 U.S. 545, 550, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1965). See also World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291, 62 L.Ed.2d 490, 100 S.Ct. 559 (1980); Mathews v. Eldridge, 424 U.S. 319, 333, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110, 23 L.Ed.2d 129, 89 S.Ct. 1562 (1969); Pennoyer v. Neff, 95 U.S. 714, 733, 24 L.Ed. 565 (1878). Peralta, supra, at 99 L.Ed.2d 81.

While it is true that the Petitioners, having filed this cause of action through their attorney, knew it was pending, it is not reasonable to expect them to be continually aware of the status of the case even without any notice being given

to them. There should be no presumption that parties to litigation are aware of all activities involving the case, even without being notified. If there were such a presumption, it would not be necessary to send any notices to either counsel, since they would be presumed to know the status of all the court's activities even without being notified.

Petitioners' case cannot be distinguished from Peralta in that the procedures utilized by the Texas courts in permitting dismissal for want of prosecution without notice are just as invalid and constitutionally infirm as the default procedures spoken to by this court in Peralta.

In this regard, Petitioners note that Rule 165a of the Texas Rules of Civil Procedure, providing for dismissal for want of prosecution, provides that notice

of dismissal is to be given, but failure to mail the notice does not affect any of the time periods running under Rule 306a with regard to finality of the action.

Petitioners submit that permitting a dismissal under Rule 165a of the Texas Rules of Civil Procedure to become final through the operation of the time period set out in Rule 306a and Rule 165a without requiring that the parties affected have actual notice of the dismissal is unconstitutional, just like the default procedures addressed by this court Peralta.

The Texas Supreme Court has followed Peralta and acknowledged its effect as far as defaults are concerned in Lopez v. Lopez, 757 S.W.2d 721, 723 (Tex. 1988).

Petitioners raised the unconstitutionality of a final dismissal without notice under the principles

enunciated by this court in Peralta in the Texas Court of Appeals for the Second Court of Appeals District of Texas. The Court of Appeals attempted to distinguish Peralta in the following way:

> Likewise, we find that the cases cited for the proposition that appellants were deprived of their right to due process inapplicable. Peralta involved a defendant who had no service of process and had not submitted to the jurisdiction of the court; it is much more easily understood how that party was deprived of his right to due process as opposed to appellants who filed suit themselves, invoked the jurisdiction of the court and then failed to give that court notice of where they could be reached. The Lopez decision involved a defendant who was never notified of a trial setting and consequently, failed to appear. The gravity of the lack of notice in these cases is more readily apparent than in the present case. These decisions in Peralta and Lopez involve a complete lack of notice without fault of the party who did not receive notice. In the present case it cannot be said that appellants'

> attorney was without fault because he knew that he had a case pending yet failed to give the district court notice of his new address.[16]

While the Texas Court of Appeals recites that Brown, Petitioners' attorney, was "not without fault" regarding the dismissal, because he failed to give the district court notice of his new address, neither the Court of Appeals nor the trial court found that failure to send a change of address to the court had anything to do with Brown's failure to receive notice of dismissal. He testified that he did not receive notice, and his testimony was unchallenged. He also testified that he had sent a change of address notice to the post office, and continued to receive his mail through the change of address.

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[16] Mathews v. Harris Methodist, Appendix, pages A-11 and A-12

The record in the Texas courts does not contain any testimony that notice was mailed to Petitioners or their attorney at any address.

Considering the record, the court of appeals' attempt to distinguish Peralta is invalid. As in Peralta, parties to litigation have suffered a final disposition of their case without notice. In this sense, Peralta is fully in point and indistinguishable, and the decision of the Texas court upholding denial of relief conflicts directly with this court's opinion in Peralta.

Since the dismissal procedures utilized and upheld by the Texas courts are just as arbitrary and pernicious as the default procedures condemned by this court in Peralta, this court should grant this petition, reverse the action of the Texas Supreme Court, the Texas Court of

Appeals, and the Texas District Court, and order this case reinstated for trial.

CONCLUSION

For the foregoing reasons, Petitioners pray that a writ of certiorari issue to review the July 22, 1992 opinion of the Court of Appeals for the Second Court of Appeals District of Texas, the order of the Texas Supreme Court of November 4, 1992 denying writ of error and the order of the Texas Supreme Court of December 2, 1992 overruling Petitioners' Motion for Rehearing. Petitioners further pray that, upon granting of the petition, the actions of the Texas courts denying relief be reversed and this cause be remanded to the Texas courts for further

action.

Respectfully submitted,

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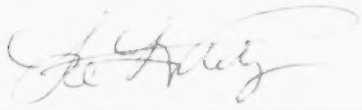

LAURANCE L. PRIDDY

ATTORNEYS FOR PETITIONERS

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

December 2, 1992

RE: Case No. D-2887

Style: EDWARD MATHEWS, BEARL MATHEWS, NEHEMIA (aka FRED) MATHEWS, NATHAN MATHEWS AND JAMES MATHEWS
v. HARRIS-METHODIST, FORT WORTH, A NON-PROFIT CORPORATION, TARRANT-PARKER COUNTY MEDICAL EXAMIN

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/
Tencha Damian, Deputy

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

November 4, 1992

RE: Case No. D-2887

Style: EDWARD MATHEWS, BEARL MATHEWS, NEHEMIA (aka FRED) MATHEWS, NATHAN MATHEWS AND JAMES MATHEWS
v. HARRIS-METHODIST, FORT WORTH, A NON-PROFIT CORPORATION, TARRANT-PARKER COUNTY MEDICAL EXAMIN

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/
Tencha Damian, Deputy

NO. 2-91-272-CV

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS
FORT WORTH

JUDGMENT

This Court has considered the record on appeal in this case and is of the opinion that there was no error in the judgment of the trial court. It is ordered, adjudged and decreed that the trial court's judgment is affirmed.

It is further ordered that appellants, Edward Mathews, Bearl Mathews, Nehemiah (aka Fred) Mathews, Nathan Mathews and James Mathews, and their sureties, Laurance L. Priddy, and Edmund Brown, pay all costs of this appeal, for which let execution issue, and that this decision be certified below for observance.

/s/ David F. Farris
JUSTICE

AFFIRM.CVje

NO. 2-91-272--CV

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH

EDWARD MATHEWS, BEARL MATHEWS, NEHEMIAH (AKA FRED) MATHEWS, NATHAN MATHEWS, AND JAMES MATHEWS APPELLANTS

VS.

HARRIS METHODIST, FORT WORTH, A NON-PROFIT CORPORATION, TARRANT-PARKER COUNTY MEDICAL EXAMINER'S DISTRICT, AND LIONS ORGAN AND EYE BANK DISTRICT 2E2, INC., A TEXAS CORPORATION APPELLEES

- - - - - - -

FROM THE 153RD DISTRICT COURT OF TARRANT COUNTY

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OPINION

- - - - - - -

Edward Mathews, Bearl Mathews, Nehemiah (aka Fred) Mathews, Nathan Mathews and James Mathews, appellants,

appeal the denial of their bill of review in which they sought to have their case reinstated after dismissal for want of prosecution. Appellants filed suit on August 7, 1989 against Harris Methodist, Fort Worth, Tarrant-Parker County Medical Examiner's District and Lions Organ and Eye Bank, District 2E2, appellees, for the wrongful removal of their deceased brother's corneas. On September 28, 1990 the court dismissed the cause for want of prosecution. Appellants filed an equitable bill of review on March 28, 1991 that was overruled by the trial court on September 13, 1991.

Appellants raised five points of error complaining the trial court abused its discretion in denying the bill of review because: (1) and (2) appellants had no notice of the dismissal of their cause of action until the dismissal was final and

the court's plenary power to reinstate had expired, which under the circumstances, was a denial of due process under the United States and Texas Constitutions; (3) the evidence demonstrates that lack of notice of the dismissal was due to a mistake occurring in the notice process; (4) there is no evidence to support the trial court's finding that appellants' failure to timely pursue their cause of action was due to appellants' fault or negligence; and (5) the trial court's finding that appellants' failure to timely pursue their cause of action was due to appellants' fault or negligence is against the great weight and preponderance of the evidence.

The facts surrounding the events leading to the dismissal of appellants' case are essentially undisputed. The

original lawsuit was filed by a lawyer named Edmund Brown in August of 1989. Brown testified that he subsequently engaged in discovery for a number of months, including interrogatories and production requests. Brown then ceased discovery in January of 1990 because he decided to involve another lawyer on the case with more experience. He contacted other lawyers and Laurance Priddy agreed to take the case. Priddy received contractual documents regarding entering the case in January of 1991 and filed his motion to be substituted as counsel in March of 1991. Upon filing, Priddy was advised the case had been dismissed and notified Brown of this fact. Brown testified that he had no notice of the dismissal until being advised by Priddy in March of 1991. Brown also testified that when the litigation started, he

officed in the Fort Worth Club Tower but had subsequently moved to another location and had provided notice to the post office. After providing the post office with a change of address, he continued to receive mail forwarded from his previous address but never received notice that this case was on the dismissal docket or had been dismissed. Brown did not notify the court or opposing counsel of his address change because he anticipated obtaining alternate counsel. Brown makes no contention that any of the appellees did anything wrongful or fraudulent causing the dismissal.

Appellants concede in their brief that they do not meet the traditional test for an equitable bill of review set forth in Alexander v. Hagedorn, 148 Tex. 565, 226 S.W.2d 996 (Tex. 1950). Alexander

requires a party to plead and prove: (1) a meritorious defense; (2) which he was prevented from making due to the fraud, accident or mistake of the opposing party; and (3) unmixed with any fault or negligence of his own. Alexander, 226 S.W.2d at 998. It is because appellants concede appellees have not committed any fraud or wrongdoing that the Alexander test is inapplicable. Instead, appellants argue that under certain circumstances a party may be entitled to a bill of review if they can prove their failure to act within the appropriate time frame was due to some mistake on the part of official personnel. See City of Laredo v. Threadgill, 686 S.W.2d 734 (Tex.App.-San Antonio 1985, no writ); Buddy "L", Inc. v. General Trailer Co., 672 S.W.2d 541 (Tex.App.-Dallas 1984, writ ref'd

n.r.e.). Alternatively, appellants argue they may be entitled to prevail if the adverse action taken on their claim occurred without notice to them so as to deprive them of due process. See Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988); Lopez v. Lopez, 757 S.W.2d 721 (Tex. 1988).

Appellants' argument alleging mistake by official personnel fails because both the Threadgrill and Buddy "L" decisions are distinguishable. Both cases actually involved some wrongdoing on the part of the opposing party as set forth in the Alexander test. The two decisions revolved around TEX. R. CIV. P. 239a which requires the party who takes a default judgment to certify the last known address of the losing party to the district clerk. In Threadgill the party

taking the default judgment never certified the address of the losing party, while in Buddy "L", the party taking the default judgment certified the incorrect address. Therefore, we find these decisions unpersuasive.

Likewise, we find that the cases cited for the proposition that appellants were deprived of their right to due process inapplicable. Peralta involved a defendant who had no service of process and had not submitted to the jurisdiction of the court; it is much more easily understood how that party was deprived of his right to due process as opposed to appellants who filed suit themselves, invoked the jurisdiction of the court and then failed to give that court notice of where they could be reached. The Lopez decision involved a defendant who was never notified of a trial setting and

consequently, failed to appear. The gravity of the lack of notice in these cases is more readily apparent than in the present case. These decisions in Peralta and Lopez involve a complete lack of notice without fault of the party who did not receive notice. In the present case it cannot be said that appellants' attorney was without fault because he knew that he had a case pending yet failed to give the district court notice of his new address.

Appellants cite additional decisions which are not on point with their due process argument because they do not involve appeals based upon due process or simply are not significantly analogous to the present case; as such we will not address those cases. Points one and two are overruled.

Appellants argue in their third point

that the uncontroverted evidence demonstrates that lack of timely notice of dismissal was due to a mistake in the notice process; however, appellants admit they could not prove whether the court did or did not mail the notice to counsel. Thus, it appears the evidence is not uncontroverted that the mistake occurred in the notice process. Moreover, appellants cite the Threadgill and Buddy "L" decisions which we discussed above and concluded were inapplicable to the disposition of this case. Appellants also argue that the notice provisions provided by the Texas Rules of Civil Procedure are ineffective to insure notice is given. However, appellants cite no authority to support this position nor do they make a valid legal argument for their position. Point three is overruled.

Points four and five are "no evidence" and "insufficient evidence" points regarding the trial court's finding that appellants' failure to timely pursue their cause of action was not free of appellants' fault or negligence. We hold that the evidence is sufficient and does support the trial court's finding that appellants were negligent because there was evidence that the case remained inactive for a least a year and appellants failed to give the district court clerk notice of their most recent mailing address. Point four and five are overruled.

The judgment of the trial court is affirmed.

/s/ DAVID F. FARRIS,
JUSTICE

PANEL A
FARRIS AND MEYERS, JJ. and Clyde R. Ashworth (Retired) (Sitting by Assignment)
PUBLISH July 22, 1992

Supreme Court, U.S.
FILED
MAR 24 1993
OFFICE OF THE CLERK

No. 92-1431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

EDWARD MATHEWS, BEARL MATHEWS, NEHEMIA MATHEWS, NATHAN MATHEWS and JAMES MATHEWS,

Petitioners,

v.

HARRIS METHODIST, FORT WORTH, A NON-PROFIT CORPORATION; TARRANT-PARKER COUNTY MEDICAL EXAMINERS DISTRICT; and LIONS ORGAN AND EYE BANK, DISTRICT 2E2, INC., A TEXAS CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Texas

BRIEF IN OPPOSITION OF RESPONDENT HARRIS METHODIST, FORT WORTH

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1431

EDWARD MATHEWS, BEARL MATHEWS, NEHEMIA MATHEWS, NATHAN MATHEWS and JAMES MATHEWS,

Petitioners,

v.

HARRIS METHODIST, FORT WORTH, A NON-PROFIT CORPORATION; TARRANT-PARKER COUNTY MEDICAL EXAMINERS DISTRICT; and LIONS ORGAN AND EYE BANK, DISTRICT 2E2, INC., A TEXAS CORPORATION,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENT HARRIS METHODIST, FORT WORTH

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT:

Respondent, Harris Methodist, Fort Worth, a non-profit corporation,[1] respectfully presents its Brief in Opposition to the Petition for Writ of Certiorari:

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[1] Disclosure required by Rule 29.1: Harris Methodist, Fort Worth is a Texas non profit corporation which operates a large acute care hospital. While it has no corporate parents or subsidiaries, it is controlled by Harris Methodist Health System, a non profit corporation.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is correct as far as it goes. However, Petitioners fail to mention the core undisputed adjudicative facts: At all relevant times, Petitioners were represented by counsel of their choice. Counsel moved his office during the pendency of the case and consciously failed to give the Court and opposing counsel notice of the change as required by Rule 8, Texas Rules of Civil Procedure.[2] Both the Trial Court and the Court of Appeals found this behavior to be negligent. *Mathews v. Harris Methodist, Fort Worth*, 834 S.W.2d 582, 585 (Tex. App.-Ft. Worth 1992, *writ denied*).

SUMMARY OF THE ARGUMENT

The Court should deny the Writ of Certiorari because Petitioners seek that Writ under the wrong statute and directed to the wrong Court. Moreover, granting the Writ and reversing the decision below would require the Court to depart from its policy of not reversing factual determinations of lower courts. The present case is distinguishable from *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 108 S. Ct. 896, 99 L.Ed.2d 75 (1988), in several particulars, the most important of which is that in the present case, Petitioners were in court as plaintiffs represented by counsel of their choice. Their case was dismissed because of that attorney's negligence. This Court's decisions uniformly charge civil litigants with the consequences of their attorneys' acts. The applicable Texas Rules and procedures afford procedural due process to litigants in general and to Petitioners in

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[2] Appendix, p. 1a.

this case. The relief which Petitioners seek, if granted, would effectively eliminate final dispositions of matters where there was inexcusable neglect by an attorney. Relief would call into question many statutes of repose, several decisions of this Court, and the jurisprudence developed since 1938 under Federal Rule of Civil Procedure 60(b)(6).

I. PETITIONERS SEEK TO INVOKE JURISDICTION UNDER THE WRONG STATUTE AND SEEK TO OBTAIN A WRIT OF CERTIORARI DIRECTED TO THE WRONG COURT.

The Petition asserts that jurisdiction is conferred by 28 U.S.C. § 1254(1).[3] That claim is erroneous on its face, because § 1254 deals with jurisdiction to review cases pending in the Federal Courts. Since the present case comes from the State Courts of Texas, this Court's jurisdiction, if it exists, exists under 28 U.S.C. § 1257(a). Moreover, Petitioners seek a Writ directed to the wrong Court.[4] If this Court were to grant a Writ directed to the Supreme Court of Texas as requested by Petitioners, the Court might inadvertently create the same sort of time consuming procedural morass reflected in the opinions in *Callender v. Florida*, 380 U.S. 519, 85 S. Ct. 1325, 14 L.Ed.2d 265 (1965) and 383 U.S. 270, 86 S. Ct. 924, 15 L.Ed.2d 749 (1966).

In the present case, the Court of Appeals for the Second Appellate District of Texas is the highest Court which decided the case. The Orders of the Supreme Court of Texas merely denied review. Moreover, as mandated by Rule 134, Texas Rules of Ap-

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[3] Petition for Writ of Certiorari ("Petition"), p. 4.

[4] Petition, caption, p. 1 and p. 29.

pellate Procedure,[5] the Appellate Record is in the possession of the Clerk of the Court of Appeals for the Second Appellate District at Fort Worth rather than in the possession of the Clerk of the Supreme Court of Texas.

Respondent does not claim that invoking jurisdiction under the wrong statute or seeking a writ directed to the wrong Court forecloses review by this Court. However, we do believe that these are matters which are required to be brought to the Court's attention under Rule 15.1. Improper invocation of the Court's jurisdiction and seeking a writ directed to the wrong Court are grounds for denying Certiorari. Both errors are indicative of the general lack of merit in the Petition.

II. PETITIONERS IMPROPERLY ASK THIS COURT TO REVERSE A CONCLUSIVE EVIDENTIARY FINDING BY THE TEXAS COURTS.

In the present case, the Court of Appeals made a conclusive factual determination:

> "We hold that the evidence is sufficient and does support the trial court's finding that Appellants were negligent because there was evidence that the case remained inactive for at least a year and Appellants failed to give the District Court Clerk notice of their most recent mailing address." *Mathews*, 834 S.W.2d at 585.

Under Texas law, the Supreme Court of Texas is without jurisdiction to review factual determinations of the Courts of Appeals. Tex. Gov't Code Ann. §

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[5] Appendix, p. 2a.

22.001 (Vernon 1988).[6] *See also, Chicago, Rock Island & Gulf Railway Company v. Harris*, 119 Tex. 65, 245 S.W.2d 385 (Tex. 1930), *Anderson, Clayton & Co. v. State*, 122 Tex. 530, 62 S.W.2d 107 (Tex. 1933); *Harmon v. Sohio Pipeline Co.*, 623 S.W.2d 314 (Tex. 1981).

As we demonstrate at Section IV *infra*, the finding of negligence by the Trial Court, affirmed by the Court of Appeals, is the central reason Petitioners' Bill of Review was denied in the Texas Courts. This Court can order the Texas Courts to grant a Bill of Review on this Record only if this Court substitutes its view of the evidence and of its sufficiency for demonstrably correct fact findings by those Courts.[7] That sort of evidentiary second guessing is generally contrary to this Court's stated policies. *National Labor Relations Board v. Pittsburg Steamship Company*, 340 U.S. 498, 71 S. Ct. 453, 95 L.Ed. 479, 482-483 (1951) (Frankfurter, J.).

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[6]Appendix, pp. 3a-4a.

[7] That there was ample evidentiary support for the Court's negligence finding cannot be doubted. Petitioners' trial counsel failed to notify the Court and the other parties of his change of address as Rule 8, Texas Rules of Civil Procedure, required him to do. Texas attorneys are charged with the standard of care of what a reasonably prudent attorney would have done under the same or similar circumstances. There is a quadripartite test for recovering monetary damages for an attorney's malpractice. The plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the breach of duty proximately caused plaintiff's injury; (4) damages resulted. Proximate causation encompasses both cause in fact and foreseeability. *Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989); *accord, Simpson v. James*, 903 F.2d 572 (5th Cir. 1990). Since the present case was not a malpractice case, the damage issue was not before the lower courts.

III. EVEN IF THIS COURT WISHES TO ANNOUNCE A NEW RULE RELIEVING LITIGANTS FROM THE CONSEQUENCES OF THEIR ATTORNEYS' NEGLIGENCE, THE PRESENT CASE IS NOT THE APPROPRIATE VEHICLE FOR THE CHANGE.

Petitioners endeavor to bootstrap the negligence of their chosen attorney into a deprivation of Fourteenth Amendment procedural due process. The attempt, while ingenious, is bizarre. It is the functional equivalent of the apocryphal tale of the parricide throwing himself on the mercy of the jury because he is an orphan. In civil cases, this Court has been unwavering in its view that litigants are bound by the acts of their attorneys. Both the rule and the reason have never been more clearly stated than in the oft cited opinion of Justice Harlan in *Link v. Wabash Railroad Company*, 370 U.S. 626, 82 S. Ct. 1386, 8 L.Ed.2d 734 (1962):

> "There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose his attorney as his representative in the action, and he cannot now avoid the consequences of the acts of omission of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' *Smith v. Ayer*, 101 US 320, 326, 25 L ed 955, 958." *Link*, 370 U.S. at 633-634, 8 L.Ed.2d at 740 (Footnote omitted).

In the omitted Footnote, the Court points out that the remedy for a party whose attorney has been negligent is a suit for malpractice. Other relief such as keeping the suit alive in order not to penalize a litigant for his attorney's negligence would amount to "visiting the sins of plaintiff's lawyer upon the *defendant*" *Link*, 370 U.S. at 633-634, 8 L.Ed. at 740 n. 10 (emphasis in original). In the case at bar, there is not even a superfically plausible explanation for Petitioners' counsel's failure to inform the Court of his change of address. There is not a hint of interference, overreaching, or bad faith by Respondent. In fact, there are findings to the contrary. *Mathews*, 834 S.W.2d at 584. This Record is not one on which to abrogate a longstanding rule and to announce that henceforth due process mandates that the Courts of the several States relieve litigants from the consequences of egregious breaches of duty by their freely chosen attorneys.

IV. THIS COURT'S DECISION IN *PERALTA* MANDATES NEITHER GRANT OF THE WRIT NOR REVERSAL OF THE COURTS BELOW.

From the time their new counsel discovered that the case had been dismissed, Petitioners have consistently attempted to analogize themselves to the successful petitioner in *Peralta, supra*. Their effort must continue to fail because the analogy is not apt. We have already demonstrated that the present case is a case of inexcusable attorney neglect rather than the case of an opposing party or a clerk failing to give notice.[8] In addition to this most important distinction and to those drawn by the Court of Appeals

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[8] *See* Sections II & III, pp. 4-7 *supra*.

in its opinion[9], *Peralta, supra*, cannot be stretched to afford Petitioners any relief. Moreover, the decisions of the Supreme Court of Texas in *Lopez v. Lopez*, 757 S.W.2d 721 (1988) and in denying review in the present case, conclusively demonstrate that the Texas Courts have understood the teaching of *Peralta* and have accommodated that teaching into Texas post-judgment relief procedures. This Court should require no more.

Properly understood *Peralta* stands for the proposition that in a case where a judgment is taken against a *non party* by a court without *in personam* jurisdiction, due process requires that a State provide a procedural mechanism for relief. There the Texas courts strictly construed the Texas requirements for granting a Bill of Review and denied relief to the non party.[10] This Court found that strict construction irreconcilable with its prior decisions requiring notice and an opportunity for hearing and concerning *in personam* jurisdiction, such as *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950); *Armstrong v. Manzo*, 380 U.S. 545, 85 S. Ct. 1187, 14 L.Ed.2d 62 (1965); and *Pennoyer v. Neff*, 5 Otto 714, 95 U.S. 714, 24 L.Ed. 565 (1877). Thus, the Court held that Texas proce-

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[9] *See Mathews*, 834 S.W.2d at 584-585.

[10] Those requirements are classically set out in *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996 (Tex. 1950). In order to obtain relief, a party must plead and prove: (1) a meritorious defense; (2) which he was prevented from making due to the fraud, accident or mistake of the opposing party; and (3) unmixed with any fault or negligence of his own. *Alexander*, 226 S.W.2d at 998. In *Peralta*, the non party could not show a meritorious defense.

dure, in order to comport with due process, must afford some means of relief to a non party against whom a judgment has been taken by a court without *in personam* jurisdiction.

Not only did the Texas Court immediately adopt the teachings of *Peralta*, but it took them further than a strict reading of the opinion requires. *Peralta* involved a final judgment against a non party. In contrast, *Lopez, supra*, involved a post-answer default judgment entered without notice against a *pro se* party.[11] In *Lopez*, the Supreme Court held that *Peralta* required relief to the *pro se* litigant who after default failed to establish a meritorious defense. *Lopez's* only real similarity to *Peralta* is that both litigants failed to set up a meritorious defense.

In contrast to both *Peralta* and *Lopez*, the present case turns neither on the merits of the underlying claim nor upon a failure to give or receive notice nor upon the fact that a party was *pro se*. The outcome of the present case in the lower courts was mandated by the negligence or fault of Petitioners' chosen counsel. The present Texas rule which can be redacted from *Alexander, supra, Peralta, supra, Lopez, supra,* and from decisions such as *City of Laredo v. Threadgill*, 686 S.W.2d 734 (Tex. App.-San Antonio 1985, *no writ*) and *Buddy "L", Inc. v. General Trailer Co.*, 672 S.W.2d 541 (Tex. App.-Dallas 1984, *writ ref'd n.r.e*) is that a litigant who has no notice of a dis-

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[11] Under Texas law, courts require the same basic showing on a motion to set aside a default judgment as they do to grant a Bill of Review. *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124 (1939); *Bank One, Texas v. Moody*, 830 S.W.2d 81 (Tex. 1992).

missal for want of prosecution must seek reinstatement within a maximum of 120 days from the date of the signing of the order of dismissal or be relegated to seek reinstatement by means of a Bill of Review. To obtain a Bill of Review, the litigant must show a meritorious claim or defense which he was prevented from making by the fraud, accident, or mistake of the opposing party or of official clerical personnel as a consequence of an act of the opposing party and unmixed with any fault or negligence of his own, or that the litigant was, in fact, a non party, or that the litigant was not represented by counsel. If the Court were to grant Petitioners the relief they seek, one would be required to add this final proviso to the Texas rule: "Provided, however, in all cases where the judgment in question is as a result of attorney negligence, incompetence, sloth, or other inexcusable neglect, the Court shall grant relief from the judgment."

Texas procedures, as they now exist, that is, as modified by *Peralta*, interpreted by *Lopez*, and delimited by the decision below in the present case serve the same equitable function as Federal Rule of Civil Procedure 60(b)(6). Granting Petitioners the relief which they seek would call into question large numbers of State and Federal procedural deadlines and statutes of limitations. Relief would certainly vitiate a significant portion of the relatively stable body of case law which has grown up around Rule 60(b)(6) Fed.R.Civ.P. since 1938. *Link, supra*; *Ackermann v. United States*, 340 U.S. 193, 71 S. Ct. 209, 95 L.Ed. 207 (1950); *Klapprott v. United States*, 335 U.S. 601, 69 S. Ct. 384, 93 L.Ed.2d 266 (1949); *Crutcher v.*

AEtna Life Insurance Co., 746 F.2d 1076 (5th Cir. 1984).

Petitioners appear to urge that due process required Respondents to prove the Petitioners received notice of the Court's intention to dismiss and of the dismissal.[12] While that requirement would, no doubt, substantially increase postal revenues due to a vast increase in the use of certified mail, due process imposes no such requirement. If due process requires proof of actual receipt in all instances, the constitutionality of Rule 5(b), Federal Rules of Civil Procedure, and the parallel provisions of Texas Rules of Civil Procedure 21 and 21a[13] is doubtful. Neither actual receipt nor proof of actual receipt is required by due process under this Court's decisions. *Irwin v. Veterans Administration*, 498 U.S. 89, 111 S. Ct. 453, 112 L.Ed.2d 435 (1990).

Procedural limitations on the power of Courts to grant relief from final judgments such as those contained in Texas Rules of Civil Procedure 165a, 306a, and 329b(f) and in Federal Rule of Civil Procedure 60(b) are in the nature of statutes of limitation or statutes of repose and bring a necessary element of finality to civil litigation. Statutes of repose have long found favor with this Court. *Shipp v. Miller's Heirs, 2 Wheat 248*, 4 L.Ed. 316 (1817); *Wilson v. Iseminger*, 185 U.S. 55, 22 S. Ct. 573, 46 L.Ed. 804 (1902). The reason is not difficult to discern:

> "There must be an end to litigation someday, and free, calculated deliberate choices are not

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[12] Petition, pp. 27-28.

[13] Appendix pp. 5a-7a.

to be relieved from." *Ackermann*, 340 U.S. at 198, 95 L.Ed. at 211.

CONCLUSION

Respondent, Harris Methodist, Fort Worth, prays that the Petition for Writ of Certiorari be denied.

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APPENDIX

APPENDIX

RULE 8–TEX. R. CIV. P.

RULE 8. ATTORNEY IN CHARGE

On the occasion of a party's first appearance through counsel, the attorney whose signature first appears on the initial pleadings for any party shall be the attorney in charge, unless another attorney is specifically designated therein. Thereafter, until such designation is changed by written notice to the court and all other parties in accordance with Rule 21a, said attorney in charge shall be responsible for the suit as to such party.

All communications from the court or other counsel with respect to a suit shall be sent to the attorney in charge.

RULE 134–TEX. R. APP. P.

RULE 134. WHEN APPLICATION DENIED, DISMISSED OR REFUSED

When the application shall have been filed for a period of ten days, if the court determines to deny, refuse or dismiss the same, whether or not the respondent has filed a brief in response, the clerk of the court will retain the application, together with the record and accompanying papers, for fifteen days from the date of rendition of the judgment denying, refusing or dismissing the writ. At the end of that time, if no motion for rehearing has been filed, or upon the overruling or dismissal of a motion for rehearing, the Clerk of the Supreme Court shall transmit to the court of appeals a certified copy of the orders denying, refusing or dismissing the application and of the order overruling the motion for rehearing and shall return all filed papers to the Clerk of the Court of Appeals, except the application for writ of error, any brief in response and any other briefs filed in the Supreme Court.

SECTION 22.001—TEX. GOV'T CODE

§ 22.001. Jurisdiction

(a) The supreme court has appellate jurisdiction except in criminal law matters, coextensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgment of the trial courts:

(1) a case in which the justices of a court of appeals disagree on a question of law material to the decision;

(2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;

(3) a case involving the construction or validity of a statute necessary to a determination of the case;

(4) a case involving state revenue;

(5) a case in which the railroad commission is a party; and

(6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.

(b) A case over which the court has jurisdiction under Subsection (a) may be carried to the supreme court either by writ of error or by certificate from the court of appeals, but the court of appeals may certify a question of law arising in any of those cases at any time it chooses. either before or after the decision of the case in that court;

(c) An appeal may be taken directly to the supreme court from an order of a trial court granting or denying

an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state. It is the duty of the supreme court to prescribe the necessary rules of procedure to be followed in perfecting the appeal.

(d) The supreme court has the power, on affidavit or otherwise, as the court may determine, to ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction.

RULE 21—TEX. R. CIV. P.

RULE 21. FILING AND SERVING PLEADINGS AND MOTIONS

Every pleading, plea, motion or application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, shall be filed with the clerk of the court in writing, shall state the grounds therefor, shall set forth the relief or order sought, and at the same time a true copy shall be served on all other parties, and shall be noted on the docket.

An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon all other parties not less than three days before the time specified for the hearing unless otherwise provided by these rules or shortened by the court.

If there is more than one other party represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney in charge.

The party or attorney of record, shall certify to the court compliance with this rule in writing over signature on the filed pleading, plea, motion or application.

After one copy is served on a party that party may obtain another copy of the same pleading upon tendering reasonable payment for copying and delivering.

RULE 21a—TEX. R. CIV. P.

RULE 21a METHODS OF SERVICE

Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be, either in person or by agent or by courier receipted delivery or by certified or registered mail, to the party's last known address, or by telephonic document transfer to the recipient's current telecopier number, or by such other manner as the court in its discretion may direct. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Service by telephonic document transfer after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon by mail or by telephonic document transfer, three days shall be added to the prescribed period. Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify. The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument. A certificate by a party or an attorney of record, or the return of an officer, or the affidavit of any person showing service of a notice shall he prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the notice or instrument was not received, or, if service was by mail, that it was not received within three

days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just. The provisions hereof relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules.

Supreme Court, U.S.
FILED
MAR 29 1993
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

EDWARD MATHEWS, BEARL MATHEWS, NEHEMIA MATHEWS, NATHAN MATHEWS AND JAMES MATHEWS, *Petitioners*

vs.

HARRIS METHODIST, FORT WORTH, A NON-PROFIT CORPORATION; TARRANT-PARKER COUNTY MEDICAL EXAMINERS DISTRICT; and LIONS ORGAN AND EYE BANK, DISTRICT 2E2, A TEXAS CORPORATION, *Respondents*

Respondent Lions Organ and Eye Bank, District 2E2, Inc.'s

Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of Texas

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II. The procedures established for notification of dismissal for lack of prosecution under Rule 165a, Texas Rules of Civil Procedure and Rule 306a, Texas Rules of Civil Procedure, providing that time periods for appeal run on dismissals even where there has been no notice of the dismissal, are not violative of due process of law as guaranteed by the 14th Amendment to the United States Constitution.

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Respondent Lions Organ and Eye Bank, District 2E2, Inc's

Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of Texas

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

LIONS ORGAN AND EYE BANK, DISTRICT 2E2, INC., Respondent herein, prays that the Petition for Writ of Certiorari heretofore filed by EDWARD MATHEWS, BEARL MATHEWS, NEHEMIA MATHEWS, NATHAN MATHEWS and JAMES MATHEWS, be denied.

STATEMENT OF THE CASE

Other than containing unjustified and unsupported conclusions, Petitioners' Statement of the Case is essentially correct. However, for the convenience of the Court, the basic factual and procedural information pertinent to the Court's disposition of this case may be clearly and concisely stated as follows:

December 6, 1987	Petitioners' brother died as a result of injuries suffered in an automobile accident.
August 7, 1989	Petitioners sued the Respondents in the 153rd District Court of Tarrant County, Texas, alleging that Respondents were liable to them under various theories for removing the corneas from their deceased brother's eyes without their consent.
September 28, 1990	The Tarrant County District Court dismissed the case for want of prosecution.
March 1991	Petitioners learned the case had been dismissed.
March 28, 1991	Petitioners filed an equitable bill of review in the 153rd District Court of Tarrant County, Texas, seeking reinstatement of the case on the basis that they had no notice of the dismissal.
September 13, 1991	Petitioners' bill of review was denied.

July 22, 1992	The Court of Appeals for the Second Court of Appeals District of Texas affirmed the trial court's denial of the bill of review.
November 4, 1992	The Texas Supreme Court denied Petitioners' Application for Writ of Error.
December 2, 1992	The Texas Supreme Court denied Petitioners' Motion for Rehearing.

STATEMENT, ARGUMENT AND AUTHORITIES

This Petition for Writ of Certiorari should be denied for the following reasons:

I. The refusal of the Texas Court of Appeals and the Texas Supreme Court to reinstate Petitioners' cause of action after its dismissal at a time when the applicable statute of limitations prevented refiling did not deprive the Petitioners of due process of law under the 14th Amendment to the United States Constitution and does not conflict with this Court's opinion in *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 99 L. Ed. 2d 75, 108 S.Ct. 896 (1988).

II. The procedures established for notification of dismissal for lack of prosecution under Rule 165a, Texas Rules of Civil Procedure and Rule 306a, Texas Rules of Civil Procedure, providing that time periods for appeal run on dismissals even where there has been no notice of the dismissal, are not violative of due process of law as guaranteed by the 14th Amendment to the United States Constitution.

Petitioners correctly state that Rule 165a of the Texas Rules of Civil Procedure establishes the procedure for dis-

missal for want of prosecution in Texas. It provides that notice of dismissal is to be sent to the attorneys, and it further provides that failure to mail the notice *does not* affect the time periods set out in Rule 306a, Texas Rules of Civil Procedure. Rule 306a also provides that all applicable time periods begin to run when the judgment is signed.

Rules 165a and 306a provide motions to reinstate causes dismissed for want of prosecution must be filed within thirty days after the order of dismissal is signed. Under Rule 306a, the running of this thirty day period is tolled for ninety days where a party has had no notice of dismissal. Consequently, in such cases, the judgment is final 120 days after it is signed, even if the parties have had no notice of the dismissal. Thereafter, review may be had only by bill of review filed pursuant to Rule 329b(f), Texas Rules of Civil Procedure.

Petitioners do not dispute the authority of a trial court to dismiss a case for want of prosecution. The sole factual basis which Petitioners relied upon in the Courts below and which they rely upon in their Petition for Writ of Certiorari is that neither Petitioners nor their then attorney, Edmund Brown, received a copy of the Notice of Dismissal sent by the Tarrant County District Court. Petitioners do not and cannot affirmatively establish that the notice was not sent; they only establish that it was not received. The opinion of the Court of Appeals for the Second Court of Appeals District of Texas accurately recounts the events surrounding the notice issue:

> ". . . The original lawsuit was filed by a lawyer named Edmund Brown in August 1989. Brown testified that he subsequently engaged in discovery for a number of months, including interrogatories and production requests. Brown then ceased discovery in January 1990 because he decided to involve another lawyer in the case with more experience. He contacted other lawyers and Laurance Priddy agreed to take the case. Priddy

> received contractual documents regarding entering the case in January 1991 and filed his motion to be substituted as counsel in March 1991. Upon filing, Priddy was advised the case had been dismissed and notified Brown of this fact. Brown testified that he had no notice of the dismissal until being advised by Priddy in March 1991. Brown also testified that when the litigation started, he officed in the Fort Worth Club Tower but had subsequently moved to another location and had provided notice to the post office. After providing the post office with a change of address, he continued to receive mail forwarded from his previous address but never received notice that this case was on the dismissal docket or had been dismissed. Brown did not notify the court or opposing counsel of his address change because he anticipated obtaining alternate counsel. Brown makes no contention that any of appellees did anything wrongful or fraudulent causing the dismissal." 834 S.W. 2d at 584.

Petitioners then used these facts to urge that "permitting a dismissal under Rule 165a of the Texas Rules of Civil Procedure to become final through the operation of the time period set out in Rule 306a and Rule 165a without requiring that the parties affected have actual notice of the dismissal is unconstitutional, just like the default procedures addressed by this [C]ourt [in] *Peralta*."

Contrary to Petitioners' assertions, *Peralta v. Heights Medical Center Inc.*, 485 U.S. 80, 99 L. Ed. 2d 75, 108 S.Ct. 896 (1988) is inapplicable to this case. It involved a default judgment taken against a defendant without notice or service. This Court held that "a judgment entered without notice or service is constitutionally infirm" because "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity

to present their objections." 485 U.S. at 84. As rationale for this holding, the Court further stated:

> ". . . As appellant asserts, had he had notice of the suit, he might have impleaded the employee whose debt had been guaranteed, worked out a settlement, or paid the debt. He would also have preferred to sell his property himself in order to raise funds rather than to suffer it sold at a constable's auction.
>
> "Nor is there any doubt that the entry of the judgment itself had serious consequences. It is not denied that the judgment was entered on the county records, became a lien on appellant's property, and was the basis for issuance of a writ of execution under which appellant's property was promptly sold without notice. Even if no execution sale had yet occurred, the lien encumbered the property and impaired appellant's ability to mortgage or alienate it; and state procedures for creating and enforcing such liens are subject to the strictures of due process. [citations omitted]" 485 U.S. at 85.

Respondent respectfully submits there is a tremendous difference between the taking of a default judgment and the case at bar. In *Peralta*, the default judgment was entered against a Defendant who had never been properly served with process and, then, the Defendant was not given notice of the judgment. Consequently, that Defendant never made an appearance in the litigation or otherwise subjected himself to the jurisdiction of the Court. In the case at bar, however, the Petitioners brought the lawsuit, thereby invoking the jurisdiction of the Court, subjecting themselves to its rules and regulations, and obligating their attorney under Rule 8, Texas Rules of Civil Procedure, to notify the Court of any change in his address.

The Court of Appeals for the Second Court of Appeals District of Texas properly recognized the distinction between the

case at bar and the default judgment addressed in *Peralta* by holding that Petitioners' rights of due process had not been violated, stating:

> ". . . we find that the cases cited for the proposition that appellants were deprived of their right to due process inapplicable. *Peralta* involved a defendant who had no service of process and had not submitted to the jurisdiction of the court; it is much more easily understood how that party was deprived of his right to due process as opposed to appellants who filed suit themselves, invoked the jurisdiction of the court and then failed to give that court notice of where they could be reached. The *Lopez* decision involved a defendant who was never notified of a trial setting and consequently, failed to appear. The gravity of the lack of notice in these cases is more readily apparent than in the present case. These decisions in *Peralta* and *Lopez* involve a complete lack of notice without fault of the party who did not receive notice. In the present case it cannot be said that appellants' attorney was without fault because he knew that he had a case pending yet failed to give the district court notice of his address."

The weakness of Petitioners' due process argument is perhaps best demonstrated by comparing the Texas Rules of Civil Procedure utilized in the case at bar to the Federal Rules of Civil Procedure and cases construing their constitutionality. Rule 41, F.R.C.P., which governs the dismissal of federal cases, is very similar to Rule 165a of the Texas Rules of Civil Procedure. In *Link v. Wabash R. Co.*, 370 U.S. 626 (1962), this Court interpreted Rule 41, F.R.C.P., to allow a court to dismiss a case for want of prosecution on its own motion, stating:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke

> this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. . . . The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." 370 U.S. 629-31.

Not only does *Link*, *supra*, authorize the dismissal of a case for want of prosecution, it also addresses the due process argument raised by Petitioners in the case at bar. It states:

> "Nor does the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing necessarily render such a dismissal void. It is true, of course, that 'the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.' [citation omitted] But this does not mean that every order entered without notice and a preliminary adversary hearing offends due process. *The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct.*" 370 U.S. at 632. (emphasis added)

This holding strongly supports the holding and rationale of the Texas Court of Appeals referred to hereinabove that "it cannot be said that [Petitioners'] attorney was without fault because he knew that he had a case pending yet failed to give the district court notice of his [new] address."

Other federal rules which are similar to the Texas rules of procedure include Rule 77(d), F.R.C.P., and Rule 4(a)(6),

F.R.A.P. Rule 77(d), F.R.C.P., which is similar to Rule 165a, T.R.C.P., provides:

> "Immediately upon the entry of an order or judgment the clerk shall service a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. *Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.*" (emphasis added)

Rule 4(a)(6), F.R.A.P., like Rule 306a, T.R.C.P., extends the time before a judgment or order becomes final in instances where notice is not given by providing:

> "The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, *may* upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal." (emphasis added)

The only substantial difference between Rule 4(a)(6), F.R.A.P., and Rule 306a, T.R.C.P., is that the federal rule provides a window of opportunity for 180 days after entry of the judgment or order complained of, while the Texas rule provides 120 days. With regard to Rule 4(a)(6), F.R.A.P., it is important to note that this rule was promulgated in 1991, thirty years after *Link v. Wabash R. Co.*, *supra*, was decided. Consequently, if due process existed in 1961 when this provi-

sion for lengthening the time to pursue an appeal did not exist, surely due process is accorded litigants under Rule 306a, T.R.C.P., and Rule 4(a)(6), F.R.A.P., which both provide an opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the court, is either not received by a party or is received so late as to impair the opportunity to pursue relief therefrom.

CONCLUSION

The judicial system requires that Trial Courts be allowed, within reasonable limitations, to control their dockets by dismissing those cases where plaintiffs have demonstrated a lack of good faith effort to pursue their claims. Texas Rules of Civil Procedure 165a and 306a, like Rules 41 and 77, F.R.C.P., and Rule 4(a)(6), F.R.A.P., establish those reasonable limitations.

The Texas Rules allow a plaintiff every opportunity to prevent such a dismissal. The plaintiff is given notice before the case is dismissed. In the case at bar, a telephone call, a letter, a request for a trial setting, a conference with the Court, or any of a number of other reasonable activities by Petitioners' attorney would have prevented this case from being dismissed. If, for whatever reason, Petitioners failed to discover the dismissal until after the fact, they were given a second chance because notice of the dismissal was sent to their attorney. Had they have come forward within 30 days, they would have only had to prove that the dismissal was not the result of their conscious indifference. In those rare instances where a party does not receive notice, the Texas Rules provide for an additional 90 days in which to move for reinstatement under the lesser standard. As the Court of Appeals for the Second Court of Appeals District of Texas states, any attorney with pending litigation has to be charged with knowledge of those

rules and the necessity to comply with them, especially if the attorney changes his address.

For the foregoing reasons, Respondent LIONS ORGAN AND EYE BANK, DISTRICT 2E2, INC., prays that the Petition for Writ of Certiorari heretofore filed by EDWARD MATHEWS, BEARL MATHEWS, NEHEMIA MATHEWS, NATHAN MATHEWS and JAMES MATHEWS, be denied.

Respectfully submitted

By: T. Andrew Beach

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MAR 2 5 1993
OFFICE OF THE CLERK

NO. 92-1431

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

EDWARD MATHEWS, BEARL MATHEWS, NEHEMIA MATHEWS, NATHAN MATHEWS AND JAMES MATHEWS
Petitioners

VS.

HARRIS METHODIST, FORT WORTH, A NON-PROFIT CORPORATION; TARRANT-PARKER COUNTY MEDICAL EXAMINERS DISTRICT; AND LIONS ORGAN AND EYE BANK, DISTRICT 2E2, INC., A TEXAS CORPORATION
Respondents

PETITIONERS' REPLY BRIEF TO BRIEF IN OPPOSITION OF RESPONDENT, HARRIS METHODIST, FORT WORTH

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AMENDED STATEMENT OF JURISDICTION

Petitioners erroneously referred to 28 U.S.C. §1254(1) as the basis for jurisdiction in this case. Petitioners agree with attorney for Respondent, Harris Methodist, that the correct jurisdictional basis for review by this Court is 28 U.S.C. §1257.

REPLY ARGUMENT

Petitioners agree that the correct jurisdictional basis for review by this Court is 28 U.S.C. §1257, since this is a review of a state court matter. However, Petitioners do believe review of the action of the Texas Supreme Court is proper, since the Texas Supreme Court is the highest court in the State of Texas that could have heard this case.

Petitioners do seek a review of the opinion of the Court of Appeals for the Second Court of Appeals District of Texas, since that court's opinion is the only written opinion in the case. However, Petitioners believe the decision of the Texas Supreme Court refusing to review the opinion of the Court of Appeals is reviewable by this Court, since the Texas Supreme Court is the highest court in the State of Texas that

could have heard the matter. Without the action of the Texas Supreme Court in refusing to hear the matter, there would be no jurisdictional basis for this Court's review.

CONCLUSION

For the reasons stated, Petitioners request this Court to grant certiorari upon the basis of the jurisdiction conferred by 28 U.S.C. §1257, to review the action of the Texas Supreme Court in refusing to hear this case and to further review the decision of the Texas Court of Appeals for the Second Court of Appeals District of Texas.

Respectfully submitted,

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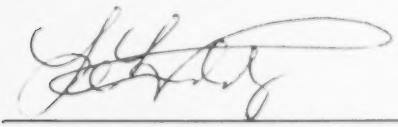

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